United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-2084

Argued by
ANTHONY J. GIRESE

United States Court of Appeals

For the Second Circuit

BOSSIE LEE HOLLAND,
Petitioner-Appellant,

against

COUNTY COURT OF NASSAU COUNTY,
Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

B/S

BRIEF FOR RESPONDENT-APPELLEE

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United States Court of Appeals

For the Second Circuit

Docket No. 76-2084

BOSSIE LEE HOLLAND,
Petitioner-Appellant,
against

COUNTY COURT OF NASSAU COUNTY,
Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

This is an appeal from an order of the Honorable Jacob Mishler, Chief Judge of the United States District Court for the Eastern District of New York, entered July 21, 1976, dismissing petitioner Bossie Lee Holland's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. A notice of appeal was served on or about July 23, and a certificate of probable cause was granted by Chief Judge Mishler on July 30, 1976.

The writ was directed to a judgment of the County Court of Nassau County (Young, J.), rendered on January 17, 1975, which convicted Holland, after a jury trial, of burglary in the third degree (N.Y. Penal Law §140.20); possession of burglar's tools (N.Y. Penal Law §140.35); and petit larceny (N.Y. Penal Law §155.25) and sentenced him to an indeterminate period of imprisonment with a maximum of four years, together with two concurrent one-year terms.

Opinions Below

The opinion and order of Chief Judge Mishler denying the petition are unreported (*see* A1-A7* No. 76 C 356). The opinion of the County Court of Nassau County suppressing the evidence here in issue is unreported (*see* A100-121). The judgment of conviction is unreported. The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, affirmed the conviction without opinion on December 17, 1975. *People* v. *Holland,* 50 A.D.2d 849, 377 N.Y.S.2d 346, *lv. to app. denied* 38 N.Y.2d 944.

Issues Presented

1. Whether Holland was afforded an "opportunity for full and fair litigation of his [Fourth Amendment] claim in the state courts" within the meaning of *Stone* v. *Powell,* —— U.S. ——, 96 S. Ct. 3037, 49 L. Ed.2d 1067 (1976)?

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* Numbered references preceded by an "A" are to the Appendix.

2. Assuming he was not, was Holland's voluntary consent to search his car, which resulted in the discovery of the challenged articles of physical evidence, constitutionally valid?

Statement of the Case

The Suppression Hearing in the County Court of Nassau County

On December 5 and 9, 1974, Judge Young of the County Court of Nassau County conducted a hearing pursuant to Holland's motion to suppress certain seized physical evidence. The court found as follows:*

> "I find that on the date in question [April 8, 1974], Detective Donohue [of the Nassau County Police Department] was advised that he was to make an investigation of an alleged burglary, and in the course of that investigation, he went to the apartment at the rear of 95A Nassau Road** in Roosevelt, and there present were the defendant and a woman who was the person who rented the apartment. The detective was accompanied by a Mr. Nelson, who was reported to be the victim of the burglary, which is the subject of this matter. There was a conversation. The detective asked the defendant for identification. He produced a license. The detective informed him he was investigating a burglary, and the detective requested the defendant to go with him to the First Precinct Stationhouse for further investigation.
>
> "A police car was called, and the defendant was taken to the Stationhouse, arriving at approximately ten minutes or so before 2 o'clock. He was taken to the Detective Squad room; there was a conflict as to whether rights

* The suppression hearing appears at A10-A121, and the quoted portion of the court's findings at A114-A118.

** The apartment in question was at the rear of the burglarized business.

were read to him. I am finding that the rights were read to him by the detective. However, I don't think it is determinative in any way of this hearing, and that the rights read were substantially in accordance with the Miranda against Arizona requirements.

"The defendant informed the detective that he would not answer any questions, and he refused to sign any statements.

"Shortly after their arrival, the detective received a phone call from Mr. Nelson, and Mr. Nelson advised him that he had seen the defendant's car, and that he thought that his property, a typewriter, which was the property stolen in the burglary, might be in the car. The detective asked the defendant for permission to search his car, and the defendant agreed that he could search the car and delivered the keys to the detective. We have a conflict of testimony here,* of course, as to whether the keys were simply put on the table along with other property of the defendant at the direction of the officers, and whether the detective did not simply pick up the keys and take them for the purpose of the search, and I am finding, as I have indicated, that the keys were delivered by the defendant to the detective. I think that the rationalization for his actions were that he believed that the typewriter, assuming that the typewriter was the subject of the burglary, and that the burglary happened, that the typewriter was no longer in his car, as was determined when the detective opened the car and searched it.

"The detective did go to the place where it was indicated the car was parked, and he opened the trunk first, and found a typewriter cover in there with the name 'Olympia' on it, and he looked in the front, and saw that there were some tools on the front seat, opened the car and looked on the front seat and under the front seat,

* A reference to a conflict in the testimony adduced at the suppression hearing. Holland stated that the officer simply seized the keys without his permission; the officer testified that he had asked for permission and Holland delivered the keys.

and he found various tools, which also are subjects of this hearing. These, of course, are tools which would be adapted to breaking and entering into closed areas, as well as a mask, which might be used in some kind of illegal operation.

"These items all were seized by the detective and taken back to Headquarters, at which time the defendant was informed that he was under arrest.

"I am finding, however, that he was under arrest when he first arrived at the Precinct, notwithstanding the conflicting statements made by the detective. I find that he was in custody, and that he was not able to leave, and that he was, in his own mind, reasonably convinced that he was in custody, and that the circumstances justified this.

"I find also, that after the defendant arrived at Police Headquarters with the detective, that he did ask for an opportunity to make a phone call, that he was given such an opportunity, that he called Mr. Sutter [the defendant's attorney] and Mr. Sutter gave him some advice. Thereafter, the defendant, of course, refused to sign any statements, having been, according to Mr. Sutter, advised that he shouldn't sign anything except the pedigree sheet and pro forma forms.

"The detective then, after coming back with the tools, then left the room where the defendant was being held. He was then placed in handcuffs and handcuffed to a chair, and the detective disappeared and returned after seeing Mr. Vassallo, who was the sole witness in the Wade Hearing, and obtaining two typewriters from Mr. Vassallo, one of which was Olympia typewriter.

"Thereupon, the defendant was processed and subsequently was taken to Mineola Police Headquarters.

"Obviously, the matter turns on a question of credibility, and that being the base for the finding of consent having been granted. I take into consideration the fact that the People have the burden of proof, and I find

that the consent was given as testified to by the detective.

"Accordingly, the items which are the subject of this hearing will be admissible at the trial, the People having borne their bu den of proof of showing the consent to the search made by the defendant."

* * *

ARGUMENT

The request for habeas corpus relief was properly denied.

In the District Court, petitioner Bossie Lee Holland sought to establish that the seizure of certain articles of physical evidence from the trunk of his car was constitutionally impermissible.

Factually, Holland had been asked to accompany a detective who was investigating the theft of a typewriter to the police station. There, after he was permitted to speak to an attorney, he was asked to consent to a search of his car, which he did. Inside that vehicle, the police found a typewriter cover in the trunk and various tools, a mask, and gloves in the passenger compartment. Holland argued that his initial accompaniment of the police officer to the stationhouse was pursuant to an illegal arrest—*i.e.*, one lacking the requisite probable cause, and that the subsequent consent to search the car was tainted. That claim may be refuted on two levels. First, the merits of the claim are not cognizable pursuant to *Stone* v. *Powell*, —— U.S. ——, 96 S. Ct. 3037, 49 L. Ed.2d 1067 (1976). Second, assuming that the claim were cognizable, there was no

illegality in the arrest, and contrariwise, assuming such illegality, the voluntary consent which produced the evidence in question was not tainted.

The Effect of *Stone* v. *Powell*

At the Nassau County Court suppression hearing, Holland did not litigate the question of the legality of the initial arrest or the effect of any taint flowing from that arrest on the voluntariness of the consent. Thus the "arresting" detective, who had testified on direct examination that he had simply "asked Mr. Holland to accompany me to the First Precinct Stationhouse" because the detective "wanted to talk to him further at the time" (A12), was not, on cross-examination, questioned extensively about such conduct (A21-22)*. Further, Holland himself was not questioned about the manner of his custody when he testified at the hearing (A64-65). And, there was no argument concerning the legality of the initial arrest or any taint flowing from it before the County Court (A104-110). Rather, Holland asked the County Court to suppress the physical evidence as the product of an involuntary consent. The County Court, accordingly, decided only the issue before it, *viz.*, that the consent was voluntary.

On July 6, 1976, the United States Supreme Court decided *Stone* v. *Powell*, *supra*. After consideration of the nature and purpose of the Fourth Amendment exclusionary rule and its operational effects on law enforcement personnel, federal-state relations, the judicial process, and

* The detective was asked if Holland was "free to leave at this point." He replied in the negative (A21).

society at large, the Court held: "That where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the grounds that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 96 S. Ct. at 3046.

As the District Court here found, Holland had an "opportunity," pursuant to Article 710 of the New York Criminal Procedure Law, to litigate any claim of illegality concerning the propriety of the seizure of the physical evidence.* Accordingly, on its face, *Stone* v. *Powell,* operates to bar habeas corpus review in this case.

Holland, however, now claims that his failure to litigate the legality of the arrest and the question of potential taint renders the holding of *Stone* v. *Powell* inapplicable, because his conduct allegedly did not amount to a "deliberate bypass [of] the orderly procedure of the state courts" within the meaning of *Fay* v. *Noia,* 372 U.S. 391 (1963).** He is mistaken.

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* CPL §710.20 provides that a defendant who "is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action" may move for its suppression upon that ground that the evidence "(1) consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action."

** The County Court, in the course of adjudging the voluntariness of Holland's consent, did find that Holland was "under arrest" and "in custody" (A118-19). The court considered this status as one factor relevant to the question of voluntariness. Of course, if this Court were to find that such findings by the County Court were tantamount to holding the arrest legal, then Holland's claim would be surely non-cognizable under *Stone* v. *Powell.*

Holland's argument is again defeated on the face of *Stone* v. *Powell.* The Court there ruled that habeas corpus relief must be denied when a man has been offered an "opportunity" for full and fair litigation of a Fourth Amendment claim in the state courts, and Holland had just such an opportunity. That he may have litigated less than he could have in the Nassau County Court cannot serve as the grounds for circumventing the ambit of *Stone* v. *Powell.* Were this to be the case, an obvious anomaly would come into existence: a state criminal defendant who does litigate every possible theory of suppression in the state court would lose any possibility of federal review pursuant to *Stone* v. *Powell,* while a man who litigates less than he could in the state court would retain such review. Thus, Holland would have this Court announce a rule which would actually encourage a "deliberate by-pass" of the state courts so as to retain federal habeas corpus review on Fourth Amendment questions, assuming that a defendant favors the latter forum. The implications for federal-state comity are disastrous, and such a holding would fly directly in the face of the considerations which prompted *Stone* v. *Powell.**

Further, Holland's citation of *Townsend* v. *Sain,* 372 U.S. 293, 313 (1963), wherein the Court held that the ap-

* It might be noted that in *Gates* v. *Henderson,* a case currently awaiting decision in this Court (No. 76-2065), a somewhat similar question is presented. *Gates* apparently made no pretrial motion to suppress certain physical evidence, nor did he object to its production during his state trial. Rather, he made a Fourth Amendment claim during his state appellate process. A federal writ of habeas corpus challenging the constitutional validity of that evidence was denied, before *Stone* v. *Powell,* on the ground of Gate's procedural default in the state courts. The initial question in *Gates* appears to be the retroactivity of *Stone* v. *Powell.*

plicant for the writ could be denied a "full and fair hearing" in various ways, including: "(5) [That] the material facts were not adequately developed at the state court hearing" is unhelpful. *Stone* v. *Powell* speaks of the opportunity for such a hearing, and not the hearing itself. While this Court might conclude that Holland's hearing was not "full and fair" within the meaning of *Townsend* because of the absence of the development of the facts necessary to judge the merits of the constitutional claim, albeit that that inadequacy was the result of action by Holland, and not the state,* it is clear that the *Stone* v. *Powell* court did not intend to merely restate *Townsend* v. *Sain*. In short, the absence of an opportunity for a full and fair hearing is surely different from the absence of such a hearing, and Holland cannot gainsay that he had the opportunity in the state trial court.** Thus, an applicant for

* Even under the traditional "deliberate by-pass test," Holland might be precluded from raising the instant claim. His failure to litigate the issue of the legality of the arrest and the effect of any taint upon the validity of the consent to search may have been a result of knowledge that the arrest was legal and that therefore his best chance of success was to establish the involuntariness of the consent in the abstract. *See Picard* v. *Connor*, 404 U.S. 270, 276 (1971); *United States ex rel. Irons* v. *Montanye*, 520 F.2d 646 (2d Cir. 1975); *United States ex rel. Gibbs* v. *Zelkes*, 496 F.2d 991, 993 (2d Cir. 1973); *Mayer* v. *Moeyhens*, 494 F.2d 855 (2d Cir.), *cert. denied* 417 U.S. 926 (1972).

** Nor should it be forgotten that Holland did attempt to litigate the legality of the arrest and the question of potential taint in the state appellate courts. The *Stone* v. *Powell* court specifically noted, on several occasions, that review of a Fourth Amendment claim on direct appeal in the state courts might itself provide an opportunity for a full and fair hearing. Here, the Appellate Division was afforded an opportunity to pass on the merits of Holland's claim *in toto* on appeal to that court. True, in that proceeding the present respondents argued that there could have been a waiver of those claims under state law. *Cf. People* v. *Morhouse*, 21 N.Y. 2d 66, 75, 286 N.Y.S.2d 657, 233 N.E.2d 705 (1967); *Matter of O'Keefe* v. *Mur-*

(footnote continued on next page)

habeas corpus relief on Fourth Amendment grounds must now, post-*Stone* v. *Powell*, demonstrate that some defect in the state standards of review or procedure prevented him from ever litigating the merits of his claim in the state courts. *See, e.g., Petillo* v. *New Jersey*, —— F. Supp. ——, 19 Cr. L. 2535 (D. N.J., 8/25/76, Civ. 1252-73, *appeal pending*), holding that New Jersey's rule not permitting suppression of evidence on the grounds of perjured police testimony before a warrant-issuing magistrate does not afford an opportunity for a full and fair hearing within the meaning of *Stone* v. *Powell*.

The Legality of the Arrest and the Effect of Any Taint Upon the Voluntariness of the Consent

Assuming, *arguendo*, that *Stone* v. *Powell* does not foreclose consideration of the underlying merits of Holland's Fourth Amendment argument, that argument is itself meritless. To demonstrate a Fourth Amendment violation, Holland must establish both that he was in custody without probable cause when he was taken to the stationhouse, and that that illegal arrest tainted his subsequent consent to search the car. The former premise is dubious, albeit, on the instant record for the reasons noted, difficult to resolve; on the latter, however, Holland is clearly doomed to failure.

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phy,, 38 N.Y.2d 563, 569, 381 N.Y.S.2d 820, 345 N.E.2d 290 (1976). Nonetheless, the fact that a state forum with jurisdiction to pass on the merits, if it so chose [New York CPL §470.15(3)(c), 6(a)] had such an opportunity should be sufficient, under *Stone* v. *Powell*, to warrant the dismissal of the writ. *Cf. Daniels* v. *Allen*, 344 U.S. 443 (1953) [cited in *Stone* v. *Powell*, 96 S.Ct. at 3043]. In this regard, it might be noted that a somewhat similar question was before the District Court in *Pulver* v. *Cunningham*, 74 Civ. 2714 (S.D.N.Y. 1976), *appeal pending*. There, the petitioner contended that he was not afforded a full and fair hearing because all of the facts potentially relevant to the suppression claim were not developed until trial. The District Court (Ward, J.) held that the fact that all the material facts were before the Appellate Division was fatal to the claim.

The County Court, as previously noted, found that Holland was "in custody" for constitutional purposes when he was asked to accompany the detective to the stationhouse (A117). *But cf. United States* v. *Beckham,* 505 F.2d 1316 (5th Cir.), *cert. denied* 409 U.S. 1043 (1975). The County Court did not rule on the question of whether there was probable cause for that arrest, pursuant to Holland's failure to litigate that issue. However, the suppression hearing testimony coupled with the trial testimony (both of which were before the District Court) reveal the existence of probable cause. For, the detective, at the time he asked Holland to accompany him to the stationhouse, knew that Holland was a frequent visitor to an apartment in the rear of the store from which the typewriter had been taken, and that the store owner had seen Holland near the store on the morning of the theft. The owner told the detective that Holland had attempted to sell to the owner what the owner believed to be stolen power tools at less than their value a few days before the typewriter theft. When the detective, before "arresting" Holland, went to Holland's apartment, finding Holland not at home, the woman with whom Holland lived told the officer that Holland was a typewriter salesman. And when the detective and the owner first confronted Holland in the apartment at the rear of the store, Holland immediately accused the owner of charging him with taking the stolen typerwriter, despite the fact that the owner had said nothing to him at this point (A24-27, 34-49, 41, 84-85; Minutes of Trial, pp. 53, 111, 163-64, 174-85; *compare Cupp* v. *Murphy,* 412 U.S. 291 (1973)).

And even accepting Holland's claim that the arrest was illegal, it is nevertheless clear that the County Court was

correct in adjudging that the consent to search the car was voluntary; and equally clear that that consent was not, under these circumstances, impugned by any taint flowing from that illegality.

The consent was surely voluntary under the test enunciated in *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973), and recently reiterated in *United States* v. *Watson,* —— U.S. ——, 96 S.Ct. 820, 46 L.Ed. 2d 598 (1976).* Holland was 49 years old, and because of prior encounters with the police, knew and understood at least the general nature of his rights *vis-a-vis* the police—indeed, he admitted such knowledge at the suppression hearing (A32-33). As the County Court found, he was advised of his *Miranda* rights shortly after his arrival at the police station (A115). He refused to answer any questions, and asked, and was permitted, to speak to his attorney (A117-18). The defendant, although in the stationhouse, was not handcuffed, personally searched, or subjected to any physical coercion. Moreover, as a one-time employee of a security service, and in view of his prior conflicts with the law, he presumably would not be intimated by the mere fact of the interview (A90, 94).

Most crucially, the request for permission to search the car was made shortly after Holland had spoken with his attorney, and was the sole question asked—there was no attempt at interrogation (A13-14, 35). And Holland's reaction was enthusiastic. In the words of the detective, he

* In *Schneckloth* v. *Bustamonte* the Court suggested that such considerations as the age of the accused; his education and intelligence; his knowledge of his rights; the length of any detention; the nature of the request for consent; the nature of any other questioning; the presence of physical coercion; and the reaction of the consentor were all factors to be considered in determining voluntariness.

replied, "Yes, sure, go ahead. There is nothing there," and handed over the automobile keys (A13-14). As the County Court specifically found, Holland had an excellent reason for such cooperation:

> "The rationalization for his actions were that he believed that the typewriter was the subject of the burglary, and that * * * the typewriter was no longer in his car." (A116)

Thus, Holland, hoping to end any suspicion focused on him, must have simply forgotten that he had left the uniquely coffee-stained typewriter cover and some burglar's paraphernalia in the car or thought that these articles would not incriminate him. Under these circumstances, where the defendant's motive for consent was obvious, there can hardly be any doubt about the voluntariness of that consent. *See United States* v. *Faruolo,* 506 F. 2d 490 (2d Cir. 1974); *United States* v. *Miley,* 513 F. 2d 1191, 1201 (2d Cir. 1975); *United States* v. *Beckham, supra; Weeks* v. *Estelle,* 509 F. 2d 760 (5th Cir. 1975).

It might also be noted that although Holland was not specifically told that he had the right to refuse to consent to the search, the wording of the request ["I asked him if I could have permission to search his car" (A14)], and his motive to accede to it renders this factor of minimal importance in judging the voluntariness of his actions. *See United States* v. *Mapp,* 476 F. 2d 67, 77 (2d Cir. 1973). And, although Holland's attorney was not recontacted concerning this request, such an action is not constitutionally required [*United States* v. *Messina,* 507 F. 2d 73, 77 (2d Cir. 1974), *cert. denied,* 420 U.S. 993 (1975)]

and, under these circumstances, the failure to do so hardly impugns the validity of the consent.

Nor was the voluntary nature of the consent tainted by any illegality flowing from the arrest. In *Santos* v. *Bayley*, 400 F. Supp. 784 (M.D. Penn. 1975), the court was confronted with a problem very similar to this one. There, state police stopped a van and illegally arrested its occupants. The police administered *Miranda* warnings while holding the occupants of the van at gunpoint. After some questioning, the troopers explained that they would like to search the van, although they had no warrant to do so, and sought consent. The occupants agreed. Drugs were found in the van.

The *Santos* district court held that the consent was voluntary and untainted by the illegal arrest. The court, relying upon decisions prior to *Brown* v. *Illinois*, 422 U.S. 590 (1975), noted four factors applicable in adjudging the existence of taint: (a) the proximity of the initial illegal custodial act to the consent; (b) the intervention of other circumstances providing a cause unrelated to the initial illegality; (c) the wantonness of the arrest and the flagrancy of police misconduct and (d) the existence of a change in circumstances "such as affording the suspect an effective opportunity to obtain the assistance of counsel." 400 F. Supp. at 790 (and cases cited therein).* *See also United States ex rel. Rigsbee* v. *Parkinson*, 407 F. Supp. 1019 (D. Ct. S. Dakota 1976); *State* v. *Shoemaker*, 533 P. 2d 123 (Wash. 1975); *People* v. *Superior Court of Marin*

* Factors essentially similar to those announced by the Supreme Court as being determinative in an illegal arrest-confession situation. *Brown* v. *Illinois*, 422 U.S. at 603.

County, 118 Cal. Rptr. 617, 530 P. 2d 585 (Cal. 1975); *Baily* v. *State,* 319 So. 2d 22 (Fla. 1975).

Here, the police conduct was not "wanton or flagrant". There is, as previously indicated, a good deal of debate over whether there was an illegal custodial act at all. And, even if the initial detention of Holland was an illegal arrest, it was a most reasonable investigatory step. The officer simply wanted to talk to Holland to establish if he was in any way connected with the crime, and sought consent to search the car for the same reason. Of course, Holland was in no way mistreated. And, too, he was given *Miranda* rights and permitted to actually talk to his attorney, a circumstance which is both a clear indication of the absence of wantonness and which itself was a "change in circumstances" within the meaning of *Santos.* Moreover, the request for consent, while apparently made early after the arrival of the detective and Holland at the stationhouse, was certainly not as temporally proximate as were the cognate events in *Santos.* And, of course, it must be remembered that this particular request for consent to search offered Holland what he reasonably believed to be an opportunity to trick the police and extricate himself from all suspicion—a tactical exercise which itself might be labeled a significant change in circumstances.

In sum, the consent here was purged of any taint.

Conclusion

The order of the District Court should be affirmed.

Respectfully submitted,

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November, 1976

#5602

Affidavit of Service by Mail

In re:

Holland v County Court of Nassau County

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on NOV 3 - 1976, 197..., he served 3 copies of the within Brief in the above named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Legal Aid Society
Nassau County
400 County Seat Drive
Mineola, New York 11501
(Attorney for Defendant-Appellant)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 3rd day of Nov. 1976

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1977